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Criminal Procedure - Right to Counsel - Indentification Evidence

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Case Comments

CRIMINAL PROCEDURE—RIGHT TO COUNSEL—IDENTIFICATION EVIDENCE —The Court of Appeals for the Third Circuit, by extending the rule of *United States v. Wade*, has held that an accused who is in custody has a right to counsel at pre-trial photographic identifications; that evidence of such out-of-court identifications conducted in the absence of the accused's counsel is not admissible at trial; and that the eyewitnesses in question are not competent to make in-court identifications.

United States v. Zeiler, 427 F.2d 1305 (3d Cir. 1970).

Over a period of more than five years, the Pittsburgh area was the victim of a series of bank robberies, all thought to have been committed by the same person. Such public interest and notoriety attended the robberies and the bandit's ability to avoid detection that the perpetrator was nicknamed the "Commuter Bandit" by the news media. Composite sketches of the alleged bandit were drawn from descriptions given by eyewitnesses, and these were widely distributed to banks and newspapers.

On June 23, 1967 William Edward Zeiler, a suspect, was arrested, and three days later counsel was appointed to defend him. A formal lineup, attended by Zeiler's counsel and some fifty witnesses to the various robberies, was conducted on July 6, 1967 in strict conformity with *United States v. Wade*.[1] On August 1, 1967 the accused was indicted by a federal grand jury.[2] Subsequently, on June 7, 1968, Zeiler and his co-defendant were convicted of bank robbery.

During the course of the trial it was discovered that after Zeiler had been taken into custoday and after counsel had been appointed for him, but before the formal lineup was held, the F.B.I., on June 29th or 30th, 1967, had privately secured a photographic identification of the accused by confronting each witness with a series of photographs of the accused and others.[3] Zeiler's counsel was not present at this identification, nor was he notified of the procedure.

1. 388 U.S. 218 (1967), in which a defendant's right to counsel at lineups was guaranteed.

2. Zeiler was indicted for the perpetration of eleven bank robberies, but since a co-defendant was also indicted on one of the robberies, the trials were severed. Zeiler was tried and convicted at the first trial on January 23, 1968 of two of the ten robberies for which he was there charged. He was found not guilty of six and two were dismissed on motion of the prosecution.

3. Identification witnesses were shown eight photographs, five of them were standard

At the conclusion of the trial, Zeiler filed a motion in arrest of judgment, for a new trial or for judgment of acquittal on the ground that the identification testimony was so tainted that it should have been stricken from the record and not considered by the jury in its deliberation. This motion was denied.[4] The Court of Appeals for the Third Circuit, by Chief Judge Hastie, reversed,[5] holding that the rule of the *Wade* case applies equally to photographic identifications of an accused who is in custody, and that such an identification held in the absence of defendant's counsel violated his sixth amendment rights. The court held that the identification testimony was improperly admitted, and that the procedure used by the F.B.I. made the witnesses in question incompetent for subsequent in-court identifications.

In this case the court was presented with one main issue—does an accused who is in custody have a right to have his counsel present at pre-trial photographic identifications? An affirmative decision on this issue made it necessary to decide the consequences of such a decision: *i.e.*, could evidence of such pre-trial identifications properly be placed before the jury, and were the witnesses in question competent to make subsequent in-court identifications?

The Sixth Amendment to the Constitution guarantees that in every criminal prosecution the accused shall have the right to the assistance of counsel for his defense.[6] It became incumbent upon the Supreme Court to interpret this guarantee in the light of modern law enforcement machinery and criminal prosecutions to determine when the right attaches.[7] The guarantee was construed to apply to any "critical stage" of the proceedings.[8] A stage is "critical" for Sixth Amendment purposes if the absence of counsel might prejudice the accused's constitutional rights.[9] The criminal defendant is "guaranteed that he need not stand alone against the state at any stage of the prosecution, formal

"rogues' gallery" dual pictures of men showing full face and profile, all but one bearing dates, and all bearing data on the reverse side; three of the photographs were ordinary snapshots of Zeiler bearing no markings on either the faces or backs thereof.

4. United States v. Zeiler, 296 F. Supp. 224 (D.Pa. 1969).

5. United States v. Zeiler, 427 F.2d 1305 (3d Cir. 1970).

6. U.S. CONST. amend. VI. The sixth amendment right to counsel was made applicable to the states through the fourteenth amendment in *Gideon v. Wainwright*, 372 U.S. 335 (1963).

7. United States v. Wade, 388 U.S. 218, 224 (1967).

8. Powell v. State of Alabama, 287 U.S. 45 (1932).

9. Critical stages have been held to include the arraignment, *Hamilton v. Alabama*, 368 U.S. 52 (1961); custodial interrogation, *Escobedo v. Illinois*, 378 U.S. 478 (1964); the preliminary hearing, *Coleman v. State of Alabama*, 90 S.Ct. 1999 (1970); lineups, *United States v. Wade*, 388 U.S. 218 (1967); the trial, *Gideon v. Wainwright*, 372 U.S. 335 (1963); and the appeal, *Douglas v. California*, 372 U.S. 353 (1963).

or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial."[10]

Thus, the reason the Supreme Court has adopted the policy of scrutinizing all pre-trial confrontations of the accused is to determine whether such proceedings are "critical stages," and "whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself."[11]

There is inherent in pre-trial confrontations a great potential for prejudicial suggestion by police officers which often contributes to the possibility of mistaken identification. If defense counsel is not present at such confrontations, he faces a difficult task in attempting to reconstruct at trial the circumstances under which they were conducted. The most he can do is attempt to impeach the testimony of identification witnesses at trial,[12] but it is difficult to determine by this method alone whether there were any suggestive influences present at the identification proceeding. Without knowledge of the manner in which the proceedings were conducted, counsel is not able effectively to cross-examine prosecution witnesses, and thus the accused is deprived of his sixth amendment right to a meaningful confrontation of witnesses.[13]

The United States Supreme Court has not considered the question presented in the instant case.[14] The *Zeiler* court, therefore, relied on

10. United States v. Wade, 388 U.S. 218, 226 (1967). The Supreme Court has refused to extend the right to counsel to preparatory stages at which the prosecution scientifically secures identification evidence. Such evidence can be effectively scrutinized at trial by cross-examination of the Government's expert witnesses and presentation of the accused's own experts. Examples of those stages presenting little risk of prejudice to the accused's rights include fingerprinting, *Smith v. United States*, 324 F.2d 879 (D.C.Cir. 1963), *cert. denied*, 377 U.S. 954 (1964); taking of blood samples, *Schmerber v. California*, 384 U.S. 757 (1966); and taking of handwriting exemplars, *Gilbert v. California*, 388 U.S. 263 (1967).

11. United States v. Wade, 388 U.S. 218, 227 (1967).

12. 29 U. PITT. L. REV. 65, 68 (1967).

13. A criminal defendant's sixth amendment right to confront witnesses against him was made applicable to the states through the Fourteenth Amendment in *Pointer v. Texas*, 380 U.S. 400 (1965).

14. The Government in *Zeiler* relied on *Simmons v. United States*, 390 U.S. 377 (1968), but that case did not deal with the issue of right to counsel at photographic identifications. There, the defendant's contention was that the pre-trial identification by means of photographs was so unnecessarily suggestive and conducive to misidentification as to deny him due process of law. *Simmons, supra*, was a pre-custody case, and the court refused to prohibit the use of photographs in the investigation process prior to arrest. The court recognized that such a procedure "has been used widely and effectively in criminal law enforcement, from the standpoint both of apprehending offenders and of sparing innocent suspects the ignominy of arrest by allowing eyewitnesses to exonerate them through scrutiny of photographs." *Id.* at 384. The due process test used by the *Simmons* court was whether considering the totality of the circumstances, "the photographic identification

United States v. Wade[15] in holding that an accused who is in custody has a right to counsel at pre-trial photographic identifications.[16]

The Supreme Court in *Wade*, concerned with the inherent danger of mistake in eyewitness identifications and the possibility of suggestive pre-trial confrontations inducing such mistake, held that at least at post-indictment lineups the defendant is entitled to the presence of counsel. The rationale of the *Zeiler* court in relying on *Wade* was that

> [t]he considerations that led the court in Wade to guarantee the right of counsel at lineups apply equally to photographic identifications conducted after the defendant is in custody. [Citations omitted.] The dangers of suggestion inherent in a corporeal lineup identification are certainly as prevalent in a photographic identification .... Also the defendant, himself not being present at such a photographic identification, is even less able to reconstruct at trial what took place unless counsel was present .... In addition, the constitutional safeguards that Wade guaranteed for lineups may be completely nullified if the police are able privately to confront witnesses prior to the lineup with suggestive photographs.[17]

The main purpose of *Wade* was to safeguard the accused's right to a meaningful confrontation of the witnesses against him at trial. This purpose was to be accomplished by assuring a basis for adequate cross-examination through the presence of counsel at pre-trial identifications. It was felt that only if defendant's counsel was present at such confrontations could the circumstances be fairly reconstructed at trial during the process of cross-examination.

In regard to photographic identifications, one writer[18] proposed that three types of suggestive influences might arise in the course of the

procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Id.*

It is significant that the Supreme Court has been given the opportunity to decide the right to counsel issue presented in *Zeiler*, but has refused. *McGee v. United States*, 402 F.2d 434 (10th Cir. 1968), *cert. denied*, 394 U.S. 908 (1968); *Rech v. United States*, 410 F.2d 1131 (10th Cir. 1969), *cert. denied*, 396 U.S. 970 (1969); *United States v. Bennett*, 409 F.2d 888 (2d Cir. 1969), *cert. denied*, 396 U.S. 852 (1969); *United States v. Baker*, 419 F.2d 83 (2d Cir. 1969), *cert. denied*, 90 S.Ct. 1096 (1970); *United States v. Hoffman*, 385 F.2d 501 (7th Cir. 1967), *cert. denied*, 390 U.S. 1031 (1967); *United States v. Collins*, 416 F.2d 696 (4th Cir. 1969), *cert. denied*, 396 U.S. 1025 (1970).

15. 388 U.S. 218 (1967).

16. United States v. Zeiler, 427 F.2d 1305, 1307 (3d Cir. 1970). *Wade* applies to all cases arising after June 12, 1967, the date of that decision and the companion decision in *Stovall v. Denno*, 388 U.S. 293 (1967), which denied retrospective effect to *Wade*. Many cases can be distinguished on the grounds that they are pre-custody cases, or that the events occurred before the effective date of *Wade*. In the present case, however, all the relevant events, including Zeiler's arrest, occurred after that date.

17. United States v. Zeiler, 427 F.2d 1305, 1307 (3d Cir. 1970).

18. 43 N.Y.U.L. Rev. 1019, 1021 (1968).

proceedings: (1) the type of photographs used could give clues as to the person suspected by police, *e.g.*, "rogues' gallery" pictures or police "mug shots" would indicate a prior criminal record, whereas ordinary snapshots might give the impression that the suspect was recently arrested, or if the witnesses had described the bandit as having a full beard and mustache, it would concededly be improper to present a series of photographs which included only one bearded person; (2) the procedure employed in presenting the photographs to the witnesses, *e.g.*, there might be seven out of ten photographs of one single individual, or the suspect's picture might be handed to the witnesses apart from a group of other pictures; or (3) the police might make suggestive comments or gestures. If counsel is not present to observe this procedure, he might have no way to discover the circumstances under which it was conducted. It is submitted, however, that in the instant case such difficulties were not present.

It was noted by Chief Judge Marsh, presiding judge at the trial, that defendant's counsel was aware of all the facts and circumstances of the photographic identification. He not only knew what type of photographs had been viewed, but he presented them at trial. He knew that the eight photographs were shown to all the identification witnesses separately and without opportunity to consult. Judge Marsh opined that "the facts concerning the publicity pictures[19] of the arrest and the photographic identifications were fully brought out on direct and cross-examination." He further stated that defendant's counsel "had no difficulty in depicting what had transpired during the publicity and at the showing of the photographs; and he presented for jury scrutiny all the elements of unfairness and unreliability."[20]

19. Understandably, there had been widespread interest in the series of robberies that had plagued the Pittsburgh area for a five year period. A composite sketch of the bandit had been drawn on the basis of eyewitness descriptions, and the sketch was distributed to banks and newspapers. When news of the arrest of a suspect reached the news media, press and television photographers stormed to the basement of the Federal Building in Pittsburgh, and photographed and televised the handcuffed defendant. He was shown being conducted by officers from an automobile into an elevator in the Federal Building, and then down the hall on the thirteenth floor to the F.B.I. offices. Comments by an F.B.I. agent were taped and broadcast with the photographs over all the major television channels in Pittsburgh. In *United States v. Zeiler*, 278 F. Supp. 112 (D.Pa. 1968), the defendant moved to suppress any testimony by eyewitnesses on the ground that such testimony was rendered incompetent as a result of the massive publicity. Defendant attributed the publicity to the arresting authorities. The motion to suppress was denied on the basis that defendant was unable to prove that the prosecuting authorities either planned the publicity, or encouraged and assisted the news media in its photographing. The court stated that even if defendant's counsel had been present, he could not have prevented the news media from taking pictures.

20. United States v. Zeiler, 296 F. Supp. 224, 227 (D. Pa. 1969).

Where, as here, defense counsel was able to reconstruct at trial the circumstances under which the pre-trial identification was conducted, and in addition was able to produce the exact photographs viewed in attempt to discredit the eyewitness testimony, it would seem that the accused was not, in fact, denied his constitutional rights and that *Wade's* purpose had been met.[21] It would be difficult to conceive of a situation in which a defendant could have a more "meaningful confrontation" of witnesses against him than in the case at bar. Only by the elimination of photographic identification procedures all together once an accused is in custody could a defendant be more fully protected, for, in *Zeiler,* defense counsel was aware of all the circumstances of the procedure except the thoughts in the minds of the witnesses. Since it is impossible to know what occurs in the mind of another, the only solution is to refuse to allow the witnesses to be placed in a thought-provoking situation such as a photographic identification. Assuming arguendo that the role of counsel would extend so far as to allow him to deny the prosecution the right to conduct a photographic identification, the obvious problem then would be in attempting to determine the thoughts of the witnesses during the lineup, or during trial.

Since the primary purpose of police procedures is to safeguard society by the apprehension of those who would harm it, it must be admitted that we cannot simply eliminate such practices, and if one could choose which were to stay and which to go, how would the decision be made?

Thus, if *Wade*'s purpose can be met, if an accused can be assured a meaningful confrontation of witnesses, the credibility of such witnesses should be left to the jury, and only where defense counsel is unable to reconstruct at trial the circumstances of the pre-trial procedures can it be said that defendant's rights were denied by the absence of his counsel at the pre-trial identification.

The decision in this case was handed down on June 5, 1970. The court relied heavily on the fact that the accused was in custody at the time of the photographic identification, and that this then became a critical stage of the proceedings.[22] It is significant, however, that on August 19, 1969 the same court, in *United States v. Conway,*[23] held that *Wade* does not apply in these circumstances

21. *Cf.* United States v. Baker, 419 F.2d 83 (2d Cir. 1969); United States ex. rel. Geralds v. Deegan, 307 F. Supp. 56 (D. N.Y. 1969).

22. United States v. Zeiler, 427 F.2d 1305, 1307, n.3 (3d Cir. 1970), where the court said: "However, when as in the present case, the investigation has resulted in the arrest of an accused, the right to counsel attaches."

23. 415 F.2d 158 (3d Cir. 1969).

> since these pre-indictment photographic identifications were not a "critical stage" of the prosecution where the presence of counsel could meaningfully have preserved defendants' rights to a fair trial . . . . There was no form of confrontation here nor, indeed, was any communication from defendants compelled or their presence even required . . . . The fact that defendants were in custody at the time of the identifications we do not regard as controlling on this record.[24]

The *Conway* case also involved a bank robbery, and the photographs in question were shown to the witnesses about a week after the robbery at a time when defendants were under arrest. The court stated that "each case it [sic] to be evaluated on its own facts . . . ,"[25] and its rationale for the *Conway* decision was that there was no suggestiveness in the conduct of these photographic identifications; there was no indication that the defendants' pictures were in any way emphasized during the display or that the F.B.I. agents made any suggestive remarks to the witnesses.[26] In a note to its opinion, however, the court recognized that there was a possibility that one witness, after having selected defendants' pictures, was informed of the significance of having done so. To this the court remarked:

> Assuming that she was 'told' that she had identified the individuals whom the F.B.I. already suspected of committing the robbery, we do not believe this record shows an improper effect on Meyers' in-court identifications of defendants, though we do not approve the practice of telling witnesses afterward how the prosecution believes they have performed in a test of identification.[27]

In *Conway*, the court implied that defendants were not denied the right to a fair trial because the circumstances of the photographic identification procedures were developed at trial on cross-examination for the jury to consider. There is no apparent reason for a different result in the present case. The court seemed to be concerned in *Zeiler* with the fact that the accused was in custody at the time of the identification —the same was true in *Conway*; it felt that the type of photographs used

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24. *Id.* at 162.
25. *Id.* at 163. Two main differences appear between the facts of *Conway*, and the facts of *Zeiler*: 1) In *Conway* the witnesses viewed the photographs about a week after the crime, while in *Zeiler* the identification was conducted almost three years after the crime; 2) Massive publicity attended Zeiler's arrest, but this situation was apparently not present in *Conway*.
26. *Id.* at 164.
27. *Id.* at 164, n.11.

in *Zeiler* were suggestive,[28] but in *Conway* it recognized that there might have been suggestive police comments; it held in *Conway* that *Wade* and *Gilbert* did not apply, and that defendants were not denied a fair trial, but it held in *Zeiler* that the rule in *Wade* did apply in order to safeguard defendant's rights. The circumstances of the identification procedure were fully developed at trial in both cases, and yet, the court reached different results on the right to counsel issue, and in *Zeiler* it failed to distinguish *Conway*.

Six other circuit courts have dealt with the issue involved here. It is interesting to note that the Third Circuit relied on some of these other circuit decisions in its *Conway* holding, but ignored them in *Zeiler*. In *Conway* it relied on *United States v. Bennett*,[29] in which the Second Circuit in February, 1969 held that the *Wade* rule should not be extended to photographic identifications when it stated:

> . . . to require that defense counsel be allowed or appointed to attend out-of-court proceedings where the defendant himself is not present would press the Sixth Amendment beyond any previous boundary. None of the classical analyses of the assistance to be given by counsel, Justice Sutherland's in Powell v. Alabama, 287 U.S. 45, 68-69, 53 S. Ct. 55, 77 L. Ed. 158 (1932), and Justice Black's in Johnson v. Zerbst, supra, 304 U.S. at 462-463, 58 S. Ct. 1019, and Gideon v. Wainwright, supra, 372 U.S. at 344-345, 83 S. Ct. 792, suggests that counsel must be present when the prosecution is interrogating witnesses in the defendant's absence even when, as here, the defendant is under arrest . . . .[30]

The Second Circuit in October, 1969[31] again held that an accused's rights were not denied in these circumstances where searching cross-examination placed all the facts of the identification before the jury for its consideration. It reaffirmed its position in February, 1970 in *United States v. Sanchez*[32] where out of eleven subjects photographed, only the accused was shown with a beard.

28. United States v. Zeiler, 427 F.2d 1305, 1308 (3d Cir. 1970), where the court noted: We have examined these photographs. Those of the other men were police "mug shots"; dual pictures showing full face and profile and bearing police markings. In contrast, the three pictures of Zeiler were ordinary snapshots; a difference which could easily have impressed the viewers who were all aware that a person thought to be the "Commuter Bandit" had only recently been apprehended. Even more suggestive was the fact that only Zeiler was pictured wearing eyeglasses, as the actual perpetrator of the robbery had done. Thus, the attention of each witness who focused on Zeiler's picture as identifying the suspect with whom the investigators were concerned.
29. 409 F.2d 888 (2d Cir. 1969).
30. *Id.* at 899-900.
31. United States v. Baker, 419 F.2d 83 (2d Cir. 1969).
32. 422 F.2d 1198 (2d Cir. 1970).

The Fourth Circuit was initially presented with the issue in *United States v. Marson*,[33] but it there avoided the issue on the ground that the relevant events in *Marson* occurred prior to the effective data of *Wade*. However, in *United States v. Collins*[34] it held that defendant was not denied his constitutional rights as a result of pre-trial photographic identifications conducted in the absence of accused's counsel.

The Fifth Circuit, in *United States v. Ballard*,[35] was confronted with the right to counsel issue when witnesses were twice requested to make photographic identifications of defendants. That case involved an armed robbery of a federally insured bank, and several witnesses said they had seen Florida license plates on the bandits' cars. The photographs of defendants viewed by the witnesses had the word "Florida" on the front of each, but the court decided that this was not impermissibly suggestive. The *Ballard* court held:

> We follow our brethren of the Second, Seventh and Tenth Circuits in holding that Gilbert and Wade—neither through Simmons nor outside Simmons—require the [sic] counsel for an accused be present at the time of any out-of-court photographic identification, regardless of whether the accused is in custody or not.[36]

The Seventh,[37] Ninth[38] and Tenth[39] Circuits have all held in accord with *Ballard*. The District of Columbia Circuit[40] and the First Circuit[41] have considered photographic identification cases, but no right to counsel issue was involved in those cases. Thus, the Third Circuit stands alone in extending *Wade* to pre-trial photographic identifications of an accused who is in custody.

Having arrived at its decision on the right to counsel issue, the court next had to determine the question of the admissibility of evidence of the out-of-court identification. It quickly resolved this problem by applying the *per se* exclusionary rule announced in *Gilbert v. California*.[42]

33. 408 F.2d 644 (4th Cir. 1968).
34. 416 F.2d 696 (4th Cir. 1969).
35. 423 F.2d 127 (5th Cir. 1970).
36. *Id.* at 131.
37. United States v. Hoffman, 385 F.2d 501 (7th Cir. 1967); United States v. Robinson, 406 F.2d 64 (7th Cir. 1969); United States v. Hutul, 416 F.2d 607 (7th Cir. 1969).
38. United States v. Sartian, 422 F.2d 387 (9th Cir. 1970); United States v. Smith, 423 F.2d 1290 (9th Cir. 1970).
39. McGee v. United States, 402 F.2d 434 (10th Cir. 1968); Rech v. United States, 410 F.2d 1131 (10th Cir. 1969).
40. Bryson v. United States, 419 F.2d 695 (D.C. Cir. 1969); Mason v. United States, 414 F.2d 1176 (D.C. Cir. 1969); United States v. Hamilton, 420 F.2d 1292 (D.C. Cir. 1969).
41. United States v. Johnson, 412 F.2d 753 (1st Cir. 1969).
42. 388 U.S. 263, 273 (1967).

There the Supreme Court held that such testimony must be excluded at trial, and that, on appeal, a new trial will be granted unless it can be shown that its introduction "was harmless beyond a reasonable doubt."[43] *Gilbert* applied *Wade*'s admissibility test for in-court identifications to testimony and evidence concerning out-of-court identifications. This was the test used in *Wong Sun v. United States*[44] in which the Supreme Court said the question was "[w]hether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."[45]

In regard to in-court identifications, *Wade* held that if such identifications had an "independent source" they would be admissible, and that, on appeal, a new trial would be denied if their introduction was "harmless error."[46] But for *Gilbert*, the question of "independent source" became moot because the court there was dealing with evidence concerning the out-of-court identification that already had been declared illegal. Thus it was left with the "harmless error" portion of *Wade*'s test. Proof that admission of the testimony was harmless error was the only way to save it. The same situation was present in *Zeiler* on this issue because it had already declared the identification proceedings illegal. The *Gilbert* court, however, failed to state what is necessary to prove harmless error.

On the basis of findings in various circuit court cases[47] it would seem that a variety of facts and circumstances must be considered, *e.g.*, whether the witnesses had ample opportunity to observe the accused in broad daylight at the time of the crime so that they would not be influenced by photographs later; whether the photographs were viewed by the witnesses separately, without opportunity to consult, and without any suggestive comments or gestures by police; whether the photographs viewed lacked suggestive influences; certainty of witnesses that they could have made an identification without the use of photographs; whether there was full disclosure at trial concerning the photographic identification, including meaningful cross-examination; and whether, generally, considering the totality of the surrounding circumstances, the

43. *Id.* at 274.
44. 371 U.S. 471 (1963).
45. *Id.* at 488.
46. 388 U.S. 218, 242 (1967).
47. United States v. Ballard, 423 F.2d 127 (5th Cir. 1970); United States v. Baker, 419 F.2d 83 (2d Cir. 1969); Rech v. United States, 410 F.2d 1131 (10th Cir. 1969).

procedure was not "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."[48]

The *Zeiler* court either did not consider the possibility of harmless error, or chose not to comment on it. The court simply stated that the "evidentiary use of the improper photographic identification obtained after the arrest of the accused and in the absence of his counsel was constitutional error."[49]

The only remaining question for the court's consideration here was whether the witnesses in question were competent to make in-court identifications of Zeiler. The Third Circuit, using *Wade*'s "independent source" rule, placed the burden on the government when it stated: "In order for such in-court identifications to be admissible the government must 'establish by clear and convincing evidence' that the witnesses were not influenced by the prior improper photographic confrontations."[50]

In order to establish an "independent source" for identification of an accused it could be shown: 1) that the witnesses had known the accused personally prior to the crime so that future identification would not be difficult; 2) that there had been sufficient time to observe the accused during the perpetration of the crime; 3) that prior to a photographic identification the witnesses had given a full and accurate description of the bandit; or 4) that the witnesses positively remembered specific or unusual characteristics of the accused.

Chief Judge Marsh noted[51] that at trial the witnesses in question positively identified Zeiler, that they remembered distinctive features of the robber such as his eyes, his mouth and his "look of hatred," that they were not influenced by the markings on the photographs, or by the prior publicity pictures, and that they all gave accurate descriptions of Zeiler, none of which was "at variance with the defendant's actual appearance . . . ."[52] The jury was instructed to disregard the testimony of the witnesses

> [i]f you believe that a witness' identification of the defendant Zeiler as the robber was a product of viewing photographs of him in combination with photographs of other persons, or from watching television pictures of him or from looking at newspaper pictures of him, shown to or viewed by that witness after the arrest of Mr. Zeiler in June, 1967, and that a witness' identification of Zeiler was

48. This was the test used in *Simmons v. United States*, 390 U.S. 377, 384 (1968).
49. United States v. Zeiler, 427 F.2d 1305, 1307 (3d Cir. 1970).
50. *Id.*
51. United States v. Zeiler, 296 F. Supp. 224, 228-229 (D. Pa. 1969).
52. *Id.* at 229.

> not an independent recollection of the robber as she or he saw him at the time of the robbery . . . .[53]

The Third Circuit, in holding that the witnesses in question were legally incompetent to make in-court identifications, found that the photographs were suggestive; the procedure violated due process; the witnesses had not had ample opportunity to view the accused at the time of the robberies; and that the unequivocal way in which the witnesses identified the accused at trial was irrelevant. It noted also that ". . . in an atmosphere already so rife with the risk of suggestion, the conduct of the F.B.I. in privately confronting the witness with suggestive photographs was particularly irresponsible and could only increase the risk of misidentification."[54] The court thus implied that in view of the massive publicity surrounding this case, it would refuse to allow the government to take advantage of any pre-trial procedure that was even slightly questionable. Perhaps, in fact, the publicity attending this case was what actually caused the court to hold as it did on all the questions involved —even in view of contrary holdings on similar facts in other circuits, and its own holding in *United States v. Conway*.[55]

Whatever its reasons were for holding as it did on the right to counsel issue, and the admissibility of evidence of out-of-court identifications, there is no justification for refusing to admit in-court identifications in light of section 3502 of the Omnibus Crime Control and Safe Streets Act of 1968.[56] The section titled "Admissibility in Evidence of Eye-Witness Testimony" provides:

> The testimony of a witness that he saw the accused commit or participate in the commission of the crime for which the accused is being tried shall be admissible in evidence in a criminal prosecution in any trial court ordained and established under article III of the Constitution of the United States.[57]

In addition to finding an "independent source" for the witness' in-court identifications, Chief Judge Marsh relied on this 1968 statute in allowing the witnesses in question to testify at trial.[58] He apparently felt that federal courts were bound by the language of the statute even in view of its effect on the Supreme Court's ruling in *United States v.*

53. *Id.* at 229, n. 10.
54. United States v. Zeiler, 427 F.2d 1305, 1308, n.4 (3d Cir. 1970).
55. 415 F.2d 158 (3d Cir. 1969).
56. 18 U.S.C.A. § 3502 (1969).
57. *Id.*
58. United States v. Zeiler, 296 F. Supp. 224, 229, n.11 (D. Pa. 1969).

Wade.[59] The legislative history of the act obviously confirms this position, as the purpose of the statute was stated as follows:

> The use of eyewitness testimony in the trial of criminal cases is an essential prosecutorial tool. The recent case of *United States v. Wade*, 87 S.Ct. 1926, 388 U.S. 218 (1967), struck a harmful blow at the nationwide effort to control crime. The Court held that an in-court identification of the suspect by an eyewitness is inadmissible unless the prosecution can show that the identification is independent of any prior identification by the witness while the suspect was in custody, and while his court appointed lawyer was neither notified nor present. It is incredible that a victim is not permitted to identify his assailant in court. The same is true of eyewitnesses who saw the victim assailed or murdered. The fact that eyewitness [sic] might on some occasion prior to trial have identified the accused, without a lawyer for the accused being present, cannot in reason, law, or commonsense justify such a disastrous rule of evidence. Nothing in the Constitution warrants it. *To counter this harmful effect, the committee adopted that portion of title II providing that eyewitness testimony is admissible in criminal prosecutions brought in the Federal courts* and that portion of title II that denies the Federal courts the power to review final state court and Federal trial court decisions declaring eyewitness testimony to be admissible.[60] [Emphasis supplied.]

The Third Circuit failed to consider or comment on the effect of section 3502 of the Crime Control Act. Other courts have avoided it also. The Second Circuit in *United States v. Bennett*[61] said: "Since we thus refuse to project United States v. Wade and its siblings into new ground . . . we have no occasion to consider the effect or validity of 18 U.S.C. § 3502, added by § 701 of the Crime Control Act of 1968."[62] The Fifth Circuit in *United States v. Ballard*,[63] and the Fourth Circuit in *United States v. Levi*[64] noted, but did not apply the statute. Two district courts also have recognized the existence of the statute without the need to apply it.[65]

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59. 388 U.S. 218 (1967).
60. *United States Code Congressional and Administrative News*, Vol. 2, 2139 (1968). (That portion of Title II that was to deny federal courts the power to review trial court decisions was never enacted.)
61. 409 F.2d 888 (2d Cir. 1969).
62. *Id.* at 900.
63. 423 F 2d 127, 129-130, n.5 (5th Cir. 1970).
64. 405 F.2d 380, 382, n.3 (4th Cir. 1968).
65. United States v. Kinnard, 294 F. Supp. 286, 291, n. (D.D.C. 1968); United States v. Clark, 289 F. Supp 610 (D. Pa. 1968), where the court stated: "The difficult constitutional issues involved in this inquiry have been avoided by the government's withdrawal of these two witnesses." *United States v. Clark, supra*, at 629, n.26.

None of the above courts was presented with the type of situation requiring application of section 3502, as the decisions indicated, but the *Zeiler* case was directly in point with the statute. Yet the Third Circuit neither applied it nor gave reasons for avoiding it, even though it was aware of its application by the district court.

In light of *Wade*, section 3502 of the Crime Control Act would probably be declared unconstitutional by the Supreme Court unless it chose to reverse *Wade*'s holding, but since that court has not ruled on the question, the federal courts are bound by the language of the statute and must allow eyewitnesses to testify at trial.

One commentator, in discussing the possible impact of Title II stated that "in effect it is a nullity."[66] His reason for such a conclusion was based on the remarks of President Johnson on signing the act into law. The writer quoted the President as stating:

> The provisions of Title II, vague and ambiguous as they are, can, I am advised by the Attorney General, be interpreted in harmony with the Constitution and *Federal practices in this field will continue to conform to the Constitution.*
>
> Under long-standing policies, for example, the Federal Bureau of Investigation and other Federal law enforcement agencies have consistently given suspects full and fair warning of their constitutional rights. *I have asked the Attorney General and the Director of the Federal Bureau of Investigation to assure that these policies will continue. . . .*[67]

It was then suggested that the President's remarks must be interpreted as a directive to federal officers "to refrain from use of eyewitness identification testimony that does not conform to the standards required by *Wade, Gilbert* and subsequent cases."[68]

It is submitted that the President of the United States, as a member of the executive branch of government, cannot, by "directive" or otherwise, attempt to change the effect of a statute enacted by Congress.[69] Such a result can be accomplished only through repeal by Congress itself, or by a declaration of unconstitutionality by the judiciary.

In the case of *Youngstown Sheet & Tube Co. v. Sawyer*,[70] the Supreme Court said:

66. Student Comments, *Title II of the Omnibus Crime Control and Safe Streets Act of 1968 as it Affects the Admissibility of Confessions and Eyewitness Testimony*, 40 Miss. L. J. 257, 281 (1969).
67. *Id.* at 280.
68. *Id.*
69. Youngstown Sheet & Tube Company v. Sawyer, 343 U.S. 579 (1952).
70. *Id.*

> *In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.* The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that *"All legislative Powers herein granted shall be vested in a Congress of the United States . . . ."*[71] [Emphasis supplied.]

Thus, until the Crime Control Act is repealed or declared unconstitutional, it must be followed by the federal courts, and should have been followed by the Third Circuit in *Zeiler.*

William Edward Zeiler has been granted a new trial at which the eyewitnesses in question shall not be permitted to identify him. The prosecution will be left with little evidence in a case in which eyewitness identification testimony is of the greatest importance, and should have been permitted under the mandate of the Omnibus Crime Control and Safe Streets Act of 1968.[72] The decision of the court to ignore this statute seems unjustified, and one would expect at least some explanation.

The procedure used by the F.B.I. here was admittedly unwise, and in other fact situations could certainly be a denial of an accused's constitutional rights. Notwithstanding the seeming inadequacies of this decision, however, the *Zeiler* holding is now the law of the Third Circuit, and it remains to be seen what this court will do with future cases posing the same issues.

MARCIA I. LAPPAS

CONSTITUTIONAL LAW—THE MAXIMUM WELFARE GRANT—The Supreme Court of the United States has held that the State of Maryland may, pursuant to its maximum grant regulation, limit the amount of AFDC public assistance to large-member welfare families without violation of the Equal Protection Clause.

Dandridge v. Williams, 90 S. Ct. 1153 (1970).

In conjunction with the federal Aid to Families with Dependent Children program,[1] the State of Maryland adopted a "maximum grant"

71. *Id.* at 587-588.
72. 18 U.S.C.A. § 3502 (1969).

1. 42 U.S.C. § 601 *et seq.* (1964) which originated with the Social Security Act of 1935, 49 Stat. 620, *as amended,* 42 U.S.C. §§ 301-1394 (1964).